No. 77-162

In the Supreme Court of the United States

OCTOBER TERM, 1977

WARREN J. WEITZEL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. i-vi) is not officially reported. The decision and order of the National Labor Relations Board are reported at 218 NLRB 87 (Pet. App. pp. viii-xxvi).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1977. On June 14, 1977, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 29, 1977. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals abused its discretion in failing to grant petitioner's motion for remand to introduce further evidence in the instant Board backpay proceeding.

STATUTORY PROVISIONS INVOLVED

Section 10(e) of the National Labor Relations Act ("Act"), 61 Stat. 147-148, as amended, 29 U.S.C. 160(e), provides in pertinent part:

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * *

STATEMENT

In an unfair labor practice proceeding, the Board determined that Shell Oil Company (the Company) had unlawfully discharged petitioner from his position as a surveyor. The Board ordered petitioner's reinstatement with backpay. 186 NLRB 941. The court of appeals enforced the Board's order. 461 F. 2d 1264. Thereafter, the instant backpay proceeding was brought to determine the amount of backpay owed to petitioner.

In the backpay proceeding, the Company contended that petitioner was not entitled to the backpay claimed because he had quit suitable interim employment, thereby incurring a willful loss of earnings. The Company presented the following evidence in support of this contention:

On March 19, 1969, two days after petitioner's discharge, he took a job as a pipefitter at Mare Island Naval Shipyard (Pet. App. p. xiii).[1] His hourly wage at Mare Island was 84 percent of what he had earned at the Company, and, with his monthly pension from the Company, he was receiving about 110 percent of his former earnings with the Company (Pet. App. p. xvii, n. 8; Vol. I, pp. 4, 11; Company Exhs. 3, 5).[2] On June 2, 1969, he quit the

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[1]Before his discharge, petitioner had worked as a surveyor for the Company for seven years. During the fourteen years preceding that period, petitioner had worked for the Company as a pipefitter (Pet. App. p. xiv).

[2]After his discharge, petitioner received monthly early retirement benefits in the amount of $216.13 per month (Pet. App. p. xiv, n. 3).

"Vol. I" references are to the papers designated as "Volume I, Pleadings" and filed with the court of appeals; "Vol. II" references

Mare Island job (Pet. App. p. xiii). The records at Mare Island indicated that petitioner said he quit because he "wish[ed] employment commensurate to [his] training [and] education as surveyor" (*ibid.*).

On June 3, 1969, petitioner spoke to Company employment relations representative Roberts and told him that he had quit his job at Mare Island for several reasons, including his desire to get into surveying work[3] and his reluctance to work overtime because overtime pay would increase his tax liability.[4] (Pet. App. pp. xiii-xiv.)

During the three years until his reinstatement at the Company, Weitzel earned a total of only $104.96 (Pet. App. p. ii). For the whole backpay period Mare Island had continuous openings for pipefitters, and there was a continual demand for pipefitters by other employers in the area (Pet. App. p. xiv; Vol. II, pp. 34-37).

At the backpay hearing, the General Counsel took the position that petitioner, by quitting his job as a pipefitter, had not forfeited his entitlement to backpay. The General Counsel argued that the Company had not met its burden of proof with respect to its contention that pipefitting

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are to the transcript of the backpay hearing, filed with the court of appeals as "Volume II, Transcript."

[3]Petitioner told Roberts that he would have had to wait three or four years to obtain a surveying job at Mare Island (Pet. App. pp. xiii-xiv). Although surveying jobs at the Company paid wages higher than those earned by pipefitters working for the same employer, surveying positions at Mare Island paid only about 80% of what was paid to pipefitters there (Pet. App. p. xiv; Vol. II, p. 38).

[4]Petitioner had also received a lump sum payment of retirement benefits from the Company which, along with a property sale, greatly increased his tax liability for 1969 (Pet. App. p. xiv, n. 3; Vol. II, p. 65).

was suitable interim employment.[5] On January 8, 1975, the Administrative Law Judge (ALJ) ruled in the Company's favor. Both the General Counsel and petitioner filed exceptions to the ALJ's decision. Petitioner asked that "the judge's decision be set aside and a new hearing ordered because the judge used material not submitted at the hearing, refused to consider evidence made available at the hearing, and did not insist all evidence be exposed to the one most concerned" (Vol. I, p. 37); at no point, however, did he state specifically what his testimony would have been had he taken the witness stand.[6]

On May 29, 1975, the Board unanimously affirmed the ALJ's decision with slight modifications not relevant here (Pet. App. pp. viii-xi). Petitioner retained counsel, but made no motion for rehearing or reopening of the record under Board Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.48(d). The court of appeals affirmed the Board's decision (Pet. App. pp. i-vi). The court held that, on the basis of the record, the Board could reasonably find that the Mare Island pipefitting job constituted suitable interim employment which petitioner could not quit without just cause.[7]

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[5]The General Counsel presented a backpay specification at the hearing, but neither the General Counsel nor petitioner presented further evidence after the Company presented its affirmative case. Petitioner was present at the hearing, but was not represented by independent counsel at that time.

[6]Petitioner asserted only that he would have discussed certain matters regarding the tax liability arising from his receipt of lump sum retirement benefits (Vol. I, p. 36; n. 4, *supra*).

[7]Judge Hufstedler dissented on the "sole ground" that the record did not support the finding that the Mare Island job was suitable interim employment. Judge Hufstedler would have remanded the case to the Board for further hearing "on the comparability issue" (Pet. App. p. vi). Petitioner sought rehearing *en banc*, arguing *inter*

ARGUMENT

Section 10(e) of the National Labor Relations Act states that the court of appeals "may order * * * additional evidence to be taken before the Board" if the petitioning party "show[s] to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board." This Court has held that a motion under Section 10(e) is "addressed to the sound judicial discretion of the court." *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104. Reversal of the court of appeals in such a case requires that this Court find not only error, but an abuse of judicial discretion. This Court has noted that "[u]ndoubtedly, an element of fair judicial discretion vested in the court below consists of respect for a wide range of discretion in the Board itself * * *." *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 16, 27. The court of appeals did not abuse its discretion in refusing to remand this case to the Board. Moreover, the court's ruling necessarily turned on the particular facts here presented and, accordingly, does not warrant review by this Court.[8]

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alia that if the court would order the Board to hold a new hearing, evidence could "be presented as to exactly what petitioner was required to do in that interim job" (Weitzel Petition for Rehearing, p. 6). The judges on the panel (including Judge Hufstedler) voted to reject the suggestion for a rehearing *en banc*, and the senior district judge sitting by designation recommended against such a rehearing; no active court of appeals judge requested a vote of the full court on the matter. (Pet. App. p. vii.)

[8]Petitioner argues (Pet. p. 16) that the court of appeals abused its discretion by failing to rule explicitly on petitioner's remand motion. This contention is incorrect. "[T]he determination of a motion need not always be expressed but may be implied by an entry of an order inconsistent with granting the relief sought." *Wimberly* v. *Clark Controller Company*, 364 F. 2d 225, 227 (C.A. 6). See also *Butterman* v. *Walston & Co.*, 50 F.R.D. 189, 191 (E.D. Wisc.); *In re S.F. Brothers Co.*, 151 F. Supp. 157, 159 (E.D. Mich.). Here the court of appeals' decision enforcing the Board's order clearly implied rejection of petitioner's belated motion for a remand.

Although petitioner complains that he was denied an opportunity to present certain evidence, he has not described the content of the evidence or testimony he wished to present.[9] Absent such an offer of proof, the Board had insufficient basis upon which to order a reopening of the record and hearing. Petitioner had the opportunity to secure counsel following the issuance of the ALJ's decision and, in fact, did retain an attorney after the Board issued its decision and order. Even after consulting with counsel, petitioner failed to petition the Board for rehearing or for reopening the record. Petitioner also failed to identify any relevant facts of which the Board was uninformed or which it did not consider. The court of appeals could reasonably conclude that petitioner did not have reasonable grounds for failing to adduce material evidence before the Board.

Indeed, in his opening brief in the court of appeals, petitioner did not suggest returning the case to the Board. Rather, he urged the position which the General Counsel had unsuccessfully maintained before the Board,[10] namely,

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[9]Petitioner's exceptions to the ALJ's decision made only general representations that he would have "correct[ed] what distortions there were" in the testimony of one Company witness and "would have given testimony which—true and accurate—would have differed sharply with the testimony" of two other witnesses (Pet. pp. 7-8; Vol. I, pp. 34, 36, 37).

[10]There is no merit to petitioner's contention (Pet. 3) that government counsel was guilty of "gross negligence" in presenting the General Counsel's case in the backpay proceeding. On cross-examination of a Company witness, counsel for the General Counsel developed the fact that pipefitting was strenuous work. Counsel for the General

that the Company had not demonstrated that the Mare Island pipefitting job constituted suitable interim employment. In light of petitioner's extensive pipefitting experience, and the substantial rate of remuneration provided by the Mare Island job, the court of appeals properly upheld the Board's suitability finding. As the court observed, "the class of suitable interim jobs is broader than the class of substantially equivalent jobs" (Pet. App. p. iv).

After petitioner's exceptions to the ALJ's decision, the possibility of a new hearing was not raised again until petitioner filed his reply brief in the court of appeals—more than seven months after petitioner initially sought review of the Board's order. Even then, no specific offer of proof was made to the court, and no reasons were given for the failure of petitioner to make such an offer to the Board at any time following the ALJ's decision. Instead, petitioner merely stated (Reply Br. 21):

> If this Court considers it necessary to take additional evidence on any issue raised below, * * * then we respectfully request that the Court consider this to be a motion for an order remanding the case to the Board for the purpose of taking additional evidence.

In these circumstances, the court of appeals did not abuse its discretion in declining to order a remand.[11]

Counsel contended that the Company had not made a *prima facie* showing that such work was "suitable" and therefore that petitioner's quitting of that job had not jeopardized his backpay award. Indeed, in his reply brief, after noting record evidence as to the strenuousness of pipefitting jobs, petitioner stated to the court of appeals that "it is understandable that the General Counsel did not put [petitioner] on the stand to testify as to just how strenuous and burdensome it was." (Reply Br. 20.)

[11] *Swinick* v. *National Labor Relations Board*, 528 F. 2d 796 (C.A. 3), on which petitioner relies (Pet. pp. 12-14), is factually distinguishable. In *Swinick*, the petitioner, appearing *pro se* at an unfair labor practice proceeding, had actively sought to present certain evidence. The ALJ denied petitioner the opportunity to present the proffered evidence, but ruled in petitioner's favor on the merits. The Board reversed the ALJ's determination on the merits, relying *inter alia* on the lack of corroboration of petitioner's testimony. Petitioner specifically applied to the court of appeals for leave to adduce additional evidence, and stated with particularity what evidence she wished to produce. In those circumstances the court of appeals found that since the proffered evidence had been rejected by the ALJ and could have resulted in a different decision by the Board, a reopening of the hearing was warranted. Here, however, petitioner made no specific offer of proof either to the Board or to the ALJ.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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